

## NOTE

**THE LAW OF NATIONS IN CYBERSPACE:  
FASHIONING A CAUSE OF ACTION FOR THE  
SUPPRESSION OF HUMAN RIGHTS REPORTS  
ON THE INTERNET**

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## INTRODUCTION

For nearly two decades, two U.S. statutes have provided redress to victims of human rights abuses: the Alien Tort Statute and the Torture Victim Protection Act. A handful of plaintiffs have recovered under these laws against foreign perpetrators of a narrow range of human rights violations.

The growth and proliferation of communications technology raises important questions about how these statutes will be used in the future. Human rights activists have discovered that they can instantly communicate over the Internet with supporters and news media anywhere in the world. Repressive regimes have responded by attempting to restrict such communications. Could cutting an activist's access to the Internet give rise to a human rights claim in U.S. courts? No one has yet sued under the Alien Tort Statute or the Torture Victim Protection Act as a result of disrupted Internet access, but such litigation is foreseeable as the Internet is increasingly used for human rights reporting.

I submit that these statutes can provide the means of bringing suits against individuals or foreign states which suppress reports on torture sent over the Internet. Part II of this note lays the foundation for this argument by briefly examining the Alien Tort Statute. This law creates a cause of action in U.S. district courts for violations of those human rights which are part of the "law of nations." Part III demonstrates that the law of nations encompasses a right to freedom of information concerning information on acts of torture, and that any violation of this right should be actionable. Part III also explores choice of law and damages issues faced by human rights claimants. Part IV explains how suppressing Internet reports on torture can constitute complicity in torture, providing a second basis for a cause of action under the Alien Tort Statute, as amended by the Torture Victim Protection Act. Part V examines additional barriers confronting torture victim claimants: sovereign immunity, the act of state doctrine, and the political question doctrine. Part VI discusses the need for legislative reform to ensure that meritorious claims for violations of the freedom of information and the prohibition on torture can be brought in federal court.

## I. HUMAN RIGHTS AND THE INTERNET

The Internet is a world-wide computer network consisting of thousands of individual computers located at universities, businesses, and homes. Scientists and computer hobbyists have used the Internet on a small scale for almost a decade. Use of the Internet has increased

greatly in recent years, however, as people have realized it is a powerful means of communication. Using the Internet, an individual can send vast amounts of information anywhere in the world instantaneously, with little more than a personal computer, a modem, and a telephone line.<sup>1</sup> People can send e-mail, documents, pictures, and even digitized sounds to other individual users or groups of users anywhere on the network. As many as 40 million users are linked to the Internet world-wide.<sup>2</sup>

The potential power of this information technology is staggering. One commentator has pointed out that during the early days of the Iranian revolution, the Ayatollah Khoemeni distributed his messages throughout Iran on cassette tapes, a slow process which reached limited numbers of people but was ultimately effective.<sup>3</sup> How much more quickly would the Shah's regime have collapsed if Khoemeni could have used the Internet to carry his messages from his home in France to thousands of locations in Iran simultaneously?

When the Zapatista rebels launched their rebellion in Mexico in 1994, they used the Internet to distribute their message world-wide.<sup>4</sup> The rebel leader, "Marcos," wrote his communiqués on a laptop computer, powered by a plug in the cigarette lighter of his pickup truck.<sup>5</sup> In the former Yugoslavia, computer users have established their own computer network, maintaining a communications link with the rest of the world. Reports of beatings of imprisoned activists have been circulated internationally, and Bosnians in the United States have used e-mail to search for lost relatives.<sup>6</sup>

Amnesty International USA has a special office devoted to reporting on torture, pending executions, and other life-threatening situations.<sup>7</sup> The office is run from one person's home in Colorado, but it reaches people all over the world. Amnesty claims that it can report an arrest so quickly over the Internet that an appeal can sometimes be around the

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1. One journalist pointed out that two "hardworking 25-year-old computer science graduates, with \$50,000 in hardware and software and little help from outsiders" linked the country of Iran to the rest of the world via the Internet. Carroll Bogert, *Chat rooms and chadors*, NEWSWEEK, Aug. 21, 1995, at 36.

2. See Scott Maier, Taking the Front Line Online; Pleas from A War-Torn Land Reach World Via PC Networks, SEATTLE POST-INTELLIGENCER, June 29, 1995, at A1.

3. See Eugene T. Rossides, Comments at the International Law Society and the Federalist Society's panel discussion "The Rule of Law, Human Rights, and 'The New World Order,'" University of Michigan Law School (Mar. 19, 1996).

4. See Tod Robberson, Mexican Rebels Using A High-Tech Weapon; Internet Helps Rally Support, WASH. POST, Feb. 20, 1995, at A1.

5. See *id.*

6. See Maier, *supra* note 2.

7. See *id.* at A10.

world before the prisoner reaches the police station.<sup>8</sup> Another organization, the Digital Freedom Network, uses the Internet to circulate materials outlawed in the authors' home countries.<sup>9</sup>

Governments have been scrambling to keep up with activists,<sup>10</sup> and clashes with human rights organizations have already occurred. In Mexico, organizations have complained that their offices have been ransacked and their telephone lines disrupted.<sup>11</sup> In Singapore, the government introduced what it called "anti-pollution measures" regulating use of the Internet and requiring all organizations posting religious or political information to register with the broadcasting authority.<sup>12</sup> The telecommunications ministry in Iran cut all the telephone lines of one Internet access provider in August 1995, allegedly to restrict access to pornography.<sup>13</sup> The Chinese Post and Telecommunications Minister recently stated that China would take steps to prevent "politically dangerous" ideas from being transmitted over the Internet.<sup>14</sup> The government of Myanmar has expressed concern about the cyberspace activities of dissidents,<sup>15</sup> and Vietnam announced the takeover of the country's Internet connection in order to protect "culture and national security."<sup>16</sup> The Internet has thus emerged as a new front in the struggle between governments and human rights activists.

Human rights law must evolve to meet the challenges of this new technology. For almost two decades, it has been possible to bring tort claims in U.S. federal courts for violations of the customary international law against torture occurring outside the United States.<sup>17</sup> Human rights advocates are increasingly using the Internet to report on torture, and as foreign government officials take steps to prevent such reporting, litigation seems inevitable. Congress and the courts will have to be prepared to respond to these developments.

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8. *See id.*

9. *See id.*

10. *See* John Perry Barlow, *Thinking Locally, Acting Globally*, TIME, Jan. 15, 1996, at 76 ("[N]ation-states are rushing to get their levers of control into cyberspace while less than 1% of the world's population is online.").

11. *See* Robberson, *supra* note 4.

12. *See Not too modern please: Asia and the Internet*, THE ECONOMIST, March 16, 1996, at 42, 43.

13. *See* Bogert, *supra* note 1.

14. *Invasion from cyberspace. China's new age*, WORLD PRESS REVIEW, March 1996, at 40.

15. *See Not too modern please, supra* note 12.

16. *Politics and Current Affairs*, THE ECONOMIST, Sept. 23, 1995, at 4.

17. *See* Filartiga v. Pena-Irala, *infra* notes 21–22, and accompanying text.

## II. THE LAW OF NATIONS AND THE ALIEN TORT STATUTE

Persons responsible for acts of torture in foreign states can be sued in federal court by their individual victims under two statutes: the Alien Tort Statute<sup>18</sup> and the Torture Victim Protection Act of 1991.<sup>19</sup> The Alien Tort Statute (ATS) grants district courts “original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>20</sup> The ATS was little known and rarely invoked<sup>21</sup> until 1980, when it provided the basis for the landmark case *Filartiga v. Pena-Irala*.<sup>22</sup>

### A. *Filartiga v. Pena-Irala*

The *Filartiga* plaintiffs, Joel Filartiga and his daughter, Dolly, were Paraguayan citizens residing in Washington, DC. They sued Americo Norberto Pena-Irala, a former Inspector General of Police in Asuncion, Paraguay, whom they discovered residing in New York. The Filartigas claimed that Pena had been responsible for the torture and murder of Joelito Filartiga, Joel’s son, in a Paraguayan police station. The plaintiffs sought \$10,000,000 in compensatory and punitive damages, alleging their cause of action arose “under ‘wrongful death statutes; the U.N. Charter; the Universal Declaration of Human Rights; the U.N. Declaration Against Torture; the American Declaration of the Rights and Duties of Man; and other pertinent declarations, documents and practices constituting the customary international law of human rights and the law of nations,’ as well as [the ATS] and the Supremacy Clause of the U.S. Constitution.”<sup>23</sup>

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18. Judiciary Act, ch. 20, § 9, 1 Stat. 76 (1789). The current version of the Alien Tort Statute appears at 28 U.S.C. § 1350 (1992).

19. 28 U.S.C. § 1350 (Supp. IV 1992). Note that a person must be acting “under actual or apparent authority, or color of law, of any foreign nation.” See discussion *infra* pp. 24–28.

20. 28 U.S.C. § 1350 (1992).

21. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980). See also *IIT v. Ven-cap*, 519 F.2d 1001 (2d Cir. 1975)(Friendly, J.), where Judge Friendly described the ATS as “kind of legal Lohengrin . . . no one seems to know whence it came.” *Id.* at 1015. Lohengrin is a mythical knight in Wagner’s opera *Lohengrin*, who declares to his beloved: “Elsa, soll ich dein Gatte heissen. Soll Land und Leut’ ich schirmen dir . . . Musst eines du geloben mir: Nie sollst du mich befragen, noch Wissens Sorge tragen, woher ich kam der Fahrt, noch wie mein Nam’ und Art!” (“Elsa, should I become thy husband, should nought the ties that bind us break, . . . one promise, Elsa, must thou make. These questions ask me never, nor think upon them ever: from whence I hither came, what is my rank or name!”) RICHARD WAGNER, *LOHENGRIN* 62–64 (Arthur Sullivan et al. eds. & John Oxenford trans., Boosey & Co. 1897).

22. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

23. *Id.* at 878 (quoting Complaint).

The United States at that time had not ratified a treaty prohibiting torture, so the plaintiffs alleged federal court jurisdiction under the ATS by demonstrating that torture is forbidden under the law of nations.<sup>24</sup> Congress subsequently enacted the Torture Victim Protection Act (TVPA) which provides a separate statutory basis for a cause of action in district court against individual torturers<sup>25</sup> and endorses the view that torture is a violation of international customary law and that such a violation is actionable in federal court.

The district court dismissed the complaint for lack of subject matter jurisdiction.<sup>26</sup> The Court of Appeals reversed, saying that the determinative question was whether Pena's alleged conduct violated the law of nations.<sup>27</sup> If it indeed violated the law of nations, the statute conferred jurisdiction upon the court and the case could proceed.

The Court of Appeals relied on the preeminent American case on customary international law, *The Paquete Habana*, which held that the traditional prohibition against seizure of an enemy's coastal fishing vessels had evolved from a standard of comity into a settled rule of international law.<sup>28</sup> This holding echoed earlier cases establishing that customary international law is binding on the United States.<sup>29</sup> Early in the Nineteenth Century in *The Nereide*, Chief Justice John Marshall wrote that U.S. courts are "bound by the law of nations, which is a part of the law of the land."<sup>30</sup> In *The Charming Betsy*, the Chief Justice established the rule of statutory interpretation that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains . . ."<sup>31</sup>

In *The Paquete Habana*, the Court instructed that "the customs and usages of civilized nations" are binding even in the absence of a treaty or other international agreement.<sup>32</sup> The Court opined that a state practice may become "a settled rule of international law" by the "general assent of civilized nations."<sup>33</sup> This statement has subsequently been understood

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24. *See id.* at 878.

25. 28 U.S.C. § 1350 (Supp. IV 1992). *See* discussion *infra* pp. 25–29.

26. *See Filartiga*, 630 F.2d at 878.

27. *See id.* at 880.

28. *The Paquete Habana*, 175 U.S. 677 (1900).

29. *See id.* at 700 ("International law is part of our law . . . [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.")

30. *The Nereide*, 13 U.S. 388, 423 (1815).

31. *The Charming Betsy*, 6 U.S. 34, 67 (1804). *The Charming Betsy* is quoted with approval in *Lauritzen v. Larson*, 345 U.S. 571, 578 (1953), and also by the Second Circuit Court of Appeals in *Filartiga*, 630 F.2d at 887 n.20 (2d Cir. 1980).

32. *The Paquete Habana*, 175 U.S. at 700.

33. *Id.* at 694.

to mean that international law is dynamic, evolving, and should not be straight-jacketed by applying 18th Century legal interpretations to modern problems.<sup>34</sup> The articulation of international law expressed in *The Paquete Habana* remains the prevailing view today.<sup>35</sup>

The *Filartiga* court concluded that “it is clear” from *The Paquete Habana* and the related cases “that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.”<sup>36</sup> By looking to the contemporary customs and usages of nations, the *Filartiga* court concluded that torture is universally condemned and is thus part of the law of nations.<sup>37</sup> International law confers upon individuals a fundamental right to be free from torture, and the ATS allows federal courts to adjudicate such rights. Thus, reasoned the court, since the prohibition on torture was part of the law of nations, the court had jurisdiction over the plaintiff’s claims against Pena.<sup>38</sup>

#### B. Criticism and Praise for *Filartiga*

Legal commentators, especially those in the human rights field, praised *Filartiga*, and lawyers began to employ it in human rights violation cases.<sup>39</sup> The decision was not without controversy, however. Judge Robert Bork delivered perhaps the sharpest attack in his concurrence in *Tel-Oren v. Libyan Arab Republic*.<sup>40</sup> Judge Bork contended that neither federal common law, federal statute, nor relevant treaties established a cause of action for an individual alien plaintiff.<sup>41</sup> He also took issue with the broad definition of the “law of nations” offered by the *Filartiga* court.<sup>42</sup> Judge Bork argued that Congress intended that the ATS provide tort jurisdiction for only three specific offenses: violation of safe-conducts, infringements on the rights of ambassadors, and

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34. See, e.g., *Filartiga*, 630 F.2d at 881. But see *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, at 819–820 (D.C.Cir. 1984)(per curiam)(Bork, J., concurring). Bork’s concurrence in *Tel-Oren* is discussed *infra* p. 8.

35. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1986).

36. *Filartiga*, 630 F.2d at 881.

37. See *id.* at 881–85.

38. See *id.*

39. See Richard B. Lillich, *Damages for Gross Violations of International Human Rights Awarded by U.S. Courts*, 15 HUM. RTS. Q. 207, 209 (1993); Joan Fitzpatrick, *The Future of the Alien Tort Claims Act of 1789: Lessons from In re Marcos Human Rights Litigation*, 67 ST. JOHN’S L. REV. 491, 492 (1993).

40. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C.Cir. 1984)(per curiam)(Bork, J., concurring).

41. See *id.* at 799.

42. See *id.* at 812–14.

piracy.<sup>43</sup> Blackstone enumerated these “offenses against the law of nations” in his Commentaries, noted Judge Bork, “writings certainly familiar to colonial lawyers.”<sup>44</sup>

Despite this criticism,<sup>45</sup> the majority of federal courts accepted the *Filartiga* holding that the ATS provides an individual alien plaintiff with a federal cause of action.<sup>46</sup> Today the prevailing view is that the ATS confers federal subject-matter jurisdiction in any case in which the plaintiff alleges a violation of the law of nations.<sup>47</sup>

The law of nations<sup>48</sup> consists of rules that states follow out of a sense of legal obligation.<sup>49</sup> It includes “general practice accepted as law,” and “the general principles of law recognized by civilized nations.”<sup>50</sup> These rules are binding on states even in the absence of treaties or other agreements.<sup>51</sup>

The law of nations includes international human rights law, but precisely what constitutes a human right depends on the source of law cited. In his seminal Four Freedoms speech in 1941, President Franklin Roosevelt called for a world founded on freedom of speech and expression, freedom of every person to worship God in his own way, freedom from want, and freedom from fear. This expansive vision helped set the stage for the creation of the United Nations at the close of World War

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43. *See id.* at 813–14.

44. *Id.*

45. Some academics have also criticized *Filartiga* and its progeny. *See, e.g.*, Alfred P. Rubin, *U.S. Torts Suits by Aliens Based on International Law*, 18–FALL FLETCHER F. WORLD AFF. 65 (1994); Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT’L & COMP. L. REV. 445 (1995).

46. *See Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996). *See also* Christopher W. Haffke, *The Torture Victim Protection Act: More Symbol Than Substance*, 43 EMORY L. J. 1467, 1479 (1994).

47. *See Abebe-Jira*, 72 F.3d at 847. *See also In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994); *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1996) (“[The] statute confers federal subject-matter jurisdiction when the following three conditions are satisfied: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations (i.e., international law.)”; *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 779 (D.C.Cir. 1984)(per curiam)(Edwards, J., concurring); *Xuncax v. Gramajo*, 886 F. Supp. 162, 180 (D. Mass. 1995).

48. Notwithstanding Judge Bork’s opinion in *Tel-Oren*, the terms “law of nations” and “customary international law” are used interchangeably by U.S. courts. *See, e.g., Filartiga*, 630 F.2d at 879–80.

49. *See* BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 244–45 (2d ed. 1995).

50. The Statute of the International Court of Justice, Art. 38, June 26, 1945, 59 Stat. 1055, 1060, 3 Bevans 1179.

51. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1986). *See also* IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 5–6 (4th ed. 1990).



II.<sup>52</sup> The United Nations Charter committed its member nations to promoting “human rights” and “fundamental freedoms.”<sup>53</sup> While these terms are undeniably vague, subsequent U.N. enactments, most notably the Universal Declaration of Human Rights<sup>54</sup>, are much more specific in identifying protected rights. These U.N. instruments, in turn, have provided the model for a host of regional instruments.<sup>55</sup> The rights thus identified constitute what some commentators call a veritable “human rights code” which gives meaning to the phrase “human rights and fundamental freedoms” in the Charter.<sup>56</sup>

### III. FASHIONING A CAUSE OF ACTION FOR VIOLATIONS OF THE FREEDOM OF INFORMATION

Not all human rights violations are actionable under the Alien Tort Statute. A wide range of rights may be called human rights, but for the purposes of ATS coverage, only *universally accepted* human rights are part of the law of nations. Determining which rights are universal can be problematic, because the law of nations is evolving, and its content and scope is determined by the consensus of nation-states.

Interference with Internet reports on torture is actionable under the ATS as a violation of the human right to freedom of information. To demonstrate this, it is necessary to determine the scope of the law of nations and to demonstrate that it encompasses the freedom of information, at least as far as freedom of information regarding torture is concerned.

#### A. *Determining the Scope of the Law of Nations*

*Filartiga v. Pena-Irala* established the principle that a human right must be so widely respected that it rises to the level of custom before it

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52. See Thomas Buergenthal, *International Human Rights Law and Institutions: Accomplishments and Prospects*, 63 WASH. L. REV. 1, 2–3. (1988).

53. U.N. CHARTER art.1, para. 3.

54. U.N. GENERAL ASSEMBLY, UNIVERSAL DECL. OF HUMAN RIGHTS, U.N. Doc. A/810, U.N. Sales No. 152.1.15 (1948) [hereinafter UNIVERSAL DECL. OF HUMAN RIGHTS].

55. See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 221, E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45, Protocol No. 5, E.T.S. 55, and Protocol No. 8, E.T.S. 118; American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 (1970); African Charter on Human and People’s Rights (Banjul Charter), June 27, 1981, 21 I.L.M. 59 (1981).

56. See THOMAS BUERGENTHAL & HAROLD G. MAIER, PUBLIC INTERNATIONAL LAW IN A NUTSHELL § 6–7 (2d ed. 1990).

is actionable.<sup>57</sup> Writing for the Second Circuit, Judge Irving Kaufman noted that:

[T]he paucity of suits successfully maintained under the [ATS] is readily attributable to the statute's requirement of alleging a "violation of the law of nations" . . . at the jurisdictional threshold . . . . [T]he narrowing construction that the Alien Tort Statute has previously received reflects the fact that earlier cases did not involve such well-established, universally recognized norms of international law that are here at issue.<sup>58</sup>

Judge Kaufman carefully reviewed previous cases brought under the ATS but dismissed for failure to establish a violation of the law of nations. He declared them to be distinguishable from *Filartiga*<sup>59</sup> because the prohibition on torture is clearly part of the law of nations. "[T]here can be little doubt," he wrote, "that this action is properly brought in federal court."<sup>60</sup>

Judge Kaufman pointed out that torture is *mutually* condemned by every nation in the world. To be actionable under the ATS, an international law violation must be of mutual concern to all nations. He cited *IIT v. Vencap*,<sup>61</sup> in which an international investment trust sued for fraud, conversion and corporate waste. Judge Kaufman noted the *IIT* court's statement that even if every nation's municipal law prohibited theft, that would not mean that "the Eighth Commandment, 'Thou Shalt not steal' . . . [is incorporated into] the law of nations."<sup>62</sup> Judge Kaufman concluded that to be actionable a principle of international law must be a collective concern of all nations: "It is only where the nations of the world have demonstrated that the wrong is of *mutual*, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the [Alien Tort Statute]."<sup>63</sup>

Judge Kaufman explained that an international law violation must also be *universally* condemned to be actionable. The "*Lopes/IIT* rule,"<sup>64</sup> said the judge, shows that "a violation of the law of nations arises only when there has been 'a violation by one or more individuals of those

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57. *Filartiga v. Pena-Irala* 630 F.2d 876 (2d Cir. 1980). *But cf.* *Handel v. Artukovic*, 601 F.Supp. 1421, 1426-27 (C.D. Cal. 1985).

58. *Filartiga*, 630 F.2d at 887-88.

59. *Id.* at 888.

60. *Id.* at 887.

61. *IIT v. Vencap*, 519 F.2d 1001 (2d Cir. 1975).

62. *Filartiga*, 630 F.2d at 888 (quoting *IIT v. Vencap*, 519 F.2d at 1015).

63. *Filartiga*, 630 F.2d at 888 (emphasis added).

64. *Id.* at 889.

standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se*.’”<sup>65</sup> Judge Kaufman endorsed this view but cautioned that international law is not static, and new rules of customary law continue to develop. “[T]he courts are not to prejudge the scope of the issues that the nations of the world may deem important to . . . their common good.”<sup>66</sup>

Judge Kaufman pointed out that torture is condemned by all nations of the world, not just severally, as individual states, but *universally*.<sup>67</sup> The nations of the world have reached an “international consensus” on the right to be free from torture, and therefore that right has become customary international law.<sup>68</sup> “[T]he torturer”, said Judge Kaufman, “has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind.”<sup>69</sup>

*Filartiga* established that torture violated the law of nations, but it did not offer a comprehensive definition of the law of nations.<sup>70</sup> It has been left to treatises and subsequent case law to fill this gap. The *Restatement of the Law of Foreign Relations* enumerates specific offenses to the law of nations.<sup>71</sup> While the *Restatement* accepts the view that international law is changing and evolving,<sup>72</sup> section 702 lists offenses which clearly violate customary international law:

A state violates international law if, as a matter of state policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations or internationally recognized human rights.<sup>73</sup>

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65. *Id.* at 889 (quoting *IIT*, 519 F.2d at 1015 (quoting *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, 297 (E.D.Pa. 1963)).

66. *Filartiga*, 630 F.2d at 888.

67. *See id.* at 884.

68. *Id.* at 884–85.

69. *Id.* at 890.

70. *See Guinto v. Marcos*, 654 F. Supp. 276, 279–80 (S.D. Cal. 1986) (“*Filartiga* provides guidance insofar as it notes that the law of nations should be interpreted not as it was in 1789, but as it has evolved . . . and to the extent that international law today limits a state’s power to torture . . . . However, there still is no consensus as to what constitutes a “law of nations.”).

71. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1986).

72. *See supra* notes 32–35 and accompanying text.

73. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1986).

The comments to the section state, however, that “the list is not necessarily complete, and is not closed.”<sup>74</sup>

Beyond the clear prohibitions contained in § 702 (a)–(g), the *Restatement* is vague about the precise parameters of customary international law. It does provide some guidance as to how to determine whether a right rises to the level of custom, citing three examples of issues that may currently be customary law or may achieve that status in the future: systematic religious discrimination, the right to property, and gender discrimination.<sup>75</sup>

Systematic religious discrimination, notes the *Restatement*, is linked in the United Nations Charter with racial discrimination and treats them both as human rights violations.<sup>76</sup> Other covenants, laws, and constitutions of states prohibit religious discrimination also. Although there is no convention on the issue yet, there is a “strong case” that systematic religious discrimination is a violation of customary law.<sup>77</sup>

A general right to own property is internationally recognized, and the Universal Declaration of Human Rights includes the right to own and not be arbitrarily deprived of property.<sup>78</sup> The *Restatement* observes that there is “wide disagreement” as to the “scope and content” of the right, and this disagreement “weighs against the conclusion” that a right to property has become customary international law.<sup>79</sup> Despite disagreement about the parameters of the right to property, there is general acceptance among states that a right to property exists. This may be dispositive, as “all states have accepted a *limited core of rights* to private property, and violation of such rights, as state policy, may already be a violation of customary law.”<sup>80</sup>

Gender discrimination is prohibited by numerous agreements, including the United Nations Charter,<sup>81</sup> the Universal Declaration of Human Rights<sup>82</sup> and the Covenant on Civil and Political Rights.<sup>83</sup> The *Restatement* notes that while many states have laws prohibiting gender discrimination, gender discrimination still occurs in many states “in

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74. *Id.* at § 702 cmt. a.

75. *See id.* at § 702 cmt. j, k, & l.

76. *See id.* at § 702 cmt. j.

77. *See id.*

78. UNIVERSAL DECL. OF HUMAN RIGHTS, *supra* note 54, art. 17.

79. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. k (1986).

80. *Id.* (emphasis added).

81. U.N. CHARTER art. 1, para. 3.

82. UNIVERSAL DECL. OF HUMAN RIGHTS, *supra* note 54, art. 2.

83. *International Covenant on Civil and Political Rights*, 1966 U.N. Jurid. Y.B. 178, U.N. Doc. ST/LEG/SER.C/4.

varying degrees.”<sup>84</sup> Discrimination in at least some matters, however, as a matter of state policy, may be prohibited by customary international law.

In its discussion of whether religious discrimination, property rights, and gender discrimination rise to the level of custom, the *Restatement* focuses on the *universality* of acceptance of a right. The discussion of property rights in comment (k) is particularly instructive. The *Restatement* acknowledges that there is wide disagreement as to the precise scope of the right, but points to the fact that there is an irreducible core right to property recognized by all states. If there is a some customary right to own property, it is this core right, on which all states agree.

Subsequent cases have followed *Filartiga v. Pena-Irala* and the *Restatement*, focusing on universality to determine if a norm is part of the law of nations. Judge Edwards in *Tel-Oren v. Libyan Arab Republic* endorsed and expanded upon Judge Kaufman’s analysis, asserting that references to piracy and slave-trading were not fortuitous.<sup>85</sup> Historically, perpetrators of these crimes were “dubbed enemies of all mankind,” and as such could be brought to justice by any state.<sup>86</sup> “The inference is that persons may be susceptible to civil liability if they commit *either* a crime traditionally warranting universal jurisdiction or an offense that comparably violates current norms of international law.”<sup>87</sup> To identify such crimes, Judge Edwards turned to *Restatement* § 702. Although he declined to say whether any of the violations enumerated in § 702 (a)-(g) actually constituted a violation of the law of nations, he endorsed the process used by the *Restatement* and other commentators to define the scope of the law of nations. The crucial inquiry, said Judge Edwards, is whether a norm is “definable, universal, and obligatory.”<sup>88</sup>

In *Guinto v. Marcos*,<sup>89</sup> the District Court for the Southern District of California confronted the question of whether the law of nations included the right to freedom of speech as understood in the First Amendment to the U.S. Constitution.<sup>90</sup> *Guinto* accepted the conclusion of *Filartiga* that the law of nations should be interpreted as it has

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84. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. 1 (1986).

85. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984)(per curiam)(Edwards, J., concurring)(Circuit Judges Edwards and Bork, and Senior Circuit Judge Robb filed separate concurring opinions in *Tel-Oren*).

86. *Id.* at 781 (quoting 1 L. Oppenheim, INT’L LAW § 272 at 609).

87. *Id.* at 781.

88. *Id.*

89. *Guinto v. Marcos*, 654 F. Supp. 276 (S.D. Cal. 1986).

90. *Guinto* did not reach the question of whether freedom of information is part of the law of nations.

evolved and exists today, not as it was in 1789, but noted that there is no consensus as to what constitutes a law of nations.<sup>91</sup> *Guinto* elected to follow Judge Edwards' universality approach from *Tel-Oren*.<sup>92</sup> The court concluded that a First Amendment right to free speech is not universally recognized, "and so does not constitute a 'law of nations.'"<sup>93</sup> In *Von Dardel v. Union of Soviet Socialist Republics*, the U.S. District Court for the District of Columbia considered whether a breach of diplomatic immunity arising from the arrest, imprisonment, and possible death of a diplomat violated the law of nations.<sup>94</sup> The Court cited *Tel-Oren* and decided that the separate concurrences of Judge Edwards and Judge Bork respectively embodied broad and narrow views of the law of nations.<sup>95</sup> Under Judge Edwards' analysis, a principle arose to the level of a law of nations if the "community of nations has reached a consensus."<sup>96</sup> By contrast, Judge Bork sought to maintain the separation of powers by limiting applicability of the ATS to only those cases where "the law of nations clearly envisions judicial involvement."<sup>97</sup> The *Von Dardel* court noted Judge Bork's reliance on a principle established in *Banco Nacional de Cuba v. Sabbatino*: "the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it," as it is less likely to be "inconsistent with the national interest or international justice."<sup>98</sup> Judge Bork's reading of *Sabbatino*, said the *Von Dardel* court, implied that the more a principle of international law is widely recognized, the more likely it is that the judiciary will be within its role of applying an established principle to circumstances of fact rather than interfering with the executive's role of determining foreign policy.<sup>99</sup> This interpretation of Judge Bork's *Tel-Oren* opinion supports the view that universality is the key to determining the scope of the law of nations.

The *Von Dardel* court found Judge Bork's opinion confusing, however, because he also stated that the law of nations should be limited to

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91. *Guinto*, 654 F. Supp. at 279.

92. *Id.* at 280.

93. *Id.* at 280.

94. *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246 (D.D.C. 1985).

95. The court also considered Judge Robb's opinion in *Tel-Oren*. Judge Robb's opinion, said *Von Dardel*, relied on the political question doctrine, which did not deprive the *Von Dardel* court of jurisdiction. *Von Dardel*, 623 F. Supp. at 258-59.

96. *See Von Dardel*, 623 F. Supp. at 257.

97. *Von Dardel*, 623 F. Supp. at 257-258.

98. *Id.* at 258 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 398, 428 (1964)).

99. *See Von Dardel*, 623 F. Supp. at 258.

the meaning it had when the ATS was adopted in 1789.<sup>100</sup> *Von Dardel* did not try to resolve this ambiguity, holding that violations of diplomatic immunity are prohibited by the law of nations under even the most narrow reading.<sup>101</sup> Nor did *Von Dardel* definitively establish the importance of universality in determining the scope of the law of nations. Nevertheless, by favorably citing Judge Edwards and pointing out the contradictions contained in Judge Bork's opinion, the case added support to the position taken in *Filartiga v. Pena-Irala* and the *Restatement* that universality is determinative.

In *Forti v. Suarez-Mason*,<sup>102</sup> the plaintiffs brought an ATS action against an Argentine general seeking damages for torture, prolonged arbitrary detention, murder, and causing a "disappearance." In defining whether the claims came within the law of nations, the District Court for the Northern District of California focused on the universality of their proscription.<sup>103</sup> The court relied on Judge Edwards' opinion in *Tel-Oren* and on the definition of an "international tort" as "first recognized in *Filartiga*."<sup>104</sup> Violations of the law of nations, held *Forti*, are "characterized by universal consensus in the international community as to their binding status and their content."<sup>105</sup> Utilizing this standard, the court found that official torture, prolonged arbitrary detention, and summary execution, violated customary international law. The court dismissed the plaintiff's fourth claim, holding that there was no international consensus as to the elements of a claim for causing the disappearance of an individual.<sup>106</sup>

This is not an exhaustive discussion of all the cases analyzing customary international law, but the trend is clear: U.S. courts have embraced *Filartiga* and the *Restatement*.<sup>107</sup>

Critics of this approach were preempted when Congress enacted the Torture Victim Protection Act of 1991 (TVPA),<sup>108</sup> which established "an unambiguous basis for a cause of action . . . under [the Alien Tort Statute]."<sup>109</sup> In reporting on the TVPA, both the House and Senate

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100. *See id.* at 258.

101. *See id.*

102. *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987).

103. *See id.* at 1539–41.

104. *Id.*

105. *Id.* at 1540.

106. *See id.* at 1543. The court eventually revisited this last claim, and held that the "international community has . . . reached a consensus on the definition of a 'disappearance'" *Forti v. Suarez-Mason*, 694 F. Supp. 707, 710 (N.D. Cal. 1988).

107. Judge Bork's concurrence in *Tel-Oren* remains a minority view. *See S. Rep. No. 102–249* at 4–5 (1991).

108. 28 U.S.C. § 1350 (1994).

109. S. REP. NO. 102–249, at 4 (1991); H.R. REP. NO. 102–367, at 3 (1991).

Committees on the Judiciary explained that the TVPA was enacted to dispel any lingering doubts about the validity of *Filartiga* and its progeny. They specifically noted Judge Bork's opinion in *Tel-Oren* questioning the existence of a private right of action under the ATS and declared that the explicit purpose of the TVPA was to grant such a right and expand on the remedy.<sup>110</sup> Under the ATS, the remedy had been available to aliens only; the TVPA extended it to U.S. citizens as well.<sup>111</sup>

The House and the Senate expressed approval of the *Filartiga* approach which focused on universality and consensus to determine when a norm rises to the level of custom. The House and Senate Reports stated that "[o]fficial torture and summary execution violate standards accepted by virtually every nation. The *universal consensus* condemning these practices has assumed the status of customary international law."<sup>112</sup> They noted that although the TVPA only dealt with torture and extra-judicial execution, the scope of customary international law is not limited to these two offenses.<sup>113</sup> Nor is the scope of the law fixed. It can change and evolve. The TVPA provides a cause of action for torture and summary execution under the ATS, but ATS claims may also be made "based on other norms that already exist *or may ripen in the future* into rules of customary international law."<sup>114</sup>

Congress has thus expressed its approval of the idea that, for purposes of the ATS, the law of nations can evolve, and the scope of the law should be determined by the consensus of states.<sup>115</sup> Thus, a norm which gains universal acceptance rises to the level of customary international law.<sup>116</sup>

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110. S. REP. NO. 102-249, at 4-5 (1991); H.R. REP. NO. 102-367, at 4 (1991).

111. S. REP. NO. 102-249, at 5 (1991); H.R. REP. NO. 102-367, at 4 (1991).

112. S. REP. NO. 102-249, at 3 (1991); H.R. REP. NO. 102-367, at 2-3 (1991) (*emphasis added*).

113. S. REP. NO. 102-249, at 5 (1991); H.R. REP. NO. 102-367, at 4 (1991).

114. H.R. REP. NO. 102-367, at 4 (1991) (*emphasis added*).

115. See *Kadic v. Karadzic*, 74 F.3d 377, 378 (2d Cir. 1996) ("Congress has made clear that its enactment of the Torture Victim Protection Act of 1991 was intended to codify the cause of action recognized by this Circuit in *Filartiga*, even as it extends the cause of action to plaintiffs who are United States citizens (citation omitted). With a broad reading of the Alien Tort Act settled as the law of this Circuit and codified by Congress as recently as 1991, we decline the invitation to limit the Act to the one category of torts that arguably prompted its enactment.").

116. Since the enactment of the Torture Victims Protection Act, one court has repackaged *Filartiga's* instruction on customary international law as a three factor test. *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995). The *Xuncax* court held that for an act to constitute a violation of customary international law: (1) no state may condone the act in question and there must be a recognizable universal consensus of prohibition against it; (2) there must be sufficient criteria to determine whether the action amounts to the prohibited act and this violates the norm; (3) the prohibition against it must be non-derogable and therefore binding at all times upon all actors. *Id.* at 184.



### B. *The Law of Nations and the Right to Freedom of Information*

By following the guidance provided by the courts and the Congress, it is possible to determine whether freedom of information has ripened into a rule of customary international law. Freedom of information is accepted in some form by nearly every nation in the world and is embodied in all the world's major human rights regimes. There is disagreement over the precise contours of the right of freedom of information, but there is a fundamental core right that is universally respected. This core right includes a right to freedom of information regarding torture. Violation of this right is the first basis on which a plaintiff may file an ATS claim for suppression of reports on torture over the Internet.

All human rights regimes recognize a right to freedom of information or expression, although the scope of that right varies considerably. Freedom of information is probably least protected in the African Charter on Human and Peoples' Rights, which was adopted by Organization of African Unity in 1963, and has been adopted by virtually every African nation.<sup>117</sup> Article 9 of the Charter protects freedom of information, declaring that "[e]very individual shall have the right to receive information" and that "[e]very individual shall have the right to express and disseminate his opinions within the law."<sup>118</sup>

The African Charter is distinctive in that it proclaims duties as well as rights,<sup>119</sup> and these limitations could arguably limit the freedoms guaranteed in Article 9. The African Charter, like the International Covenant on Civil and Political Rights, declares that individuals have responsibilities to their communities,<sup>120</sup> but the Charter "is the first human rights treaty to include an enumeration of, to give forceful attention to, individual's duties."<sup>121</sup> The duties of individuals are outlined in Articles 27, 28, and 29 of the African Charter, and Article 29 is particularly broad in reach.<sup>122</sup> Phrases such as "serve the national community," "not

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117. See Human and People's Rights in Africa and The African Charter, Report of a Conference held in Nairobi from 2 to 4 December 1985 convened by the International Commission of Jurists, 93–94.

118. African Charter on Human and People's Rights (Banjul Charter), June 27, 1981, 21 I.L.M. 59 (1981), art. 9.

119. See Burns Weston et al., *Regional Human Rights Regimes: A Comparison and Appraisal*, 20 Vand. J. Transnat'l L. 585, 608–14 (1987); Lees Flinterman & Evelyn Ankumah, *The African Charter on Human and Peoples' Rights*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 165–66 (H. Hannum 2d ed., 1992).

120. *International Covenant on Civil and Political Rights*, *supra* note 83.

121. HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 692 (1996).

122. Article 27.

to compromise the security of the state,” and “strengthen social and national solidarity” sound suspiciously like grounds on which a nation could seek to justify severe limitations on the right to freedom of information.<sup>123</sup>

Other international regimes recognize a right to freedom of information as well. Article 19 of the Universal Declaration of Human Rights states that “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>124</sup> Article 19 of the International Covenant on Civil and Political Rights contains a similar provision, guaranteeing “the right to freedom of expression,” including “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers . . . through any . . . media . . .”, though this right may be limited as necessary to protect national security, public order, or public health or morals.<sup>125</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 10, and the American

1. Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community.
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality, and common interest.

Article 28.

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

Article 29.

The individual shall also have the duty:

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;
2. To serve this national community by placing his physical and intellectual abilities at its service;
3. Not to compromise the security of the State whose national or resident he is;
4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened;
5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defense in accordance with the law; . . .
8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African Unity.

African Charter on Human and People’s Rights (Banjul Charter), June 27, 1981, 21 I.L.M. 59 (1981), arts. 27–29.

123. See STEINER & ALSTON, *supra* note 122, at 694.

124. UNIVERSAL DECL. OF HUMAN RIGHTS, *supra* note 54, art. 19.

125. *International Covenant on Civil and Political Rights*, *supra* note 83, at 184.

Convention on Human Rights, Article 13, protect the freedom of expression with provisions substantially similar to those contained in the Universal Declaration and the ICCPR.<sup>126</sup> The European Convention, however, states that this right may be limited “in the interests of national security, . . . for the prevention of disorder or crime, . . . for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”<sup>127</sup> The American Convention also contains the *caveat* that the exercise of the right to freedom of expression may be limited as necessary for “the protection of national security, public order, or public health or morals.”<sup>128</sup> Despite these qualifying provisions in the various human rights instruments, it is generally recognized that freedom of information is a *superior* right, not in competition with an equivalent right of the state to limit access to information for national security reasons. In the well-known case of *Sunday Times v. United Kingdom*, the European Court of Human Rights explained that the decisionmaker in human rights litigation “is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.”<sup>129</sup>

Nevertheless, in the context of torture, the question arises whether the exceptions devour the rule. May a state in any way restrict reporting or receiving information about torture under the right to freedom of information? If so, it would be hard to claim that such a right to freedom of information has achieved the level of universality and consensus required for it become part of the law of nations under the ATS.

The answer is an unequivocal *no*. Though the right to freedom of information is subject to exceptions in all international human rights regimes, it attains customary international law status because a “core right” to freedom of information exists universally. Furthermore, that

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126. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 221, E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45, Protocol No. 5, E.T.S. 55, and Protocol No. 8, E.T.S. 118, Article 10; American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 (1970), Article 13.

127. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 221, E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45, Protocol No. 5, E.T.S. 55, and Protocol No. 8, E.T.S. 118, Article 10.

128. American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 (1970), Article 13.

129. *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) at 41 (1979). *See also* *Observer and Guardian v. United Kingdom*, 216 Eur. Ct. H.R. (ser. A) at 20 (1991) (restraints necessary in interests of national security, protecting reputation or rights of others, preventing disclosure of information received in confidence and for maintaining authority of judiciary).

right is non-derogable in all circumstances. The *Restatement* notes that the right to property has not been clearly defined by all states, but “all states have accepted a *limited core of rights* to private property, and violation of such rights, as state policy, may already be a violation of customary law.”<sup>130</sup> Following this line of analysis it is possible to identify a non-derogable core right to freedom of information, because all states have accepted the primacy of the right in at least some circumstances.

Transnational freedom of information attained the level of an internationally recognized human right through the initiative of the Western Democracies after World War II.<sup>131</sup> From its founding, the United Nations General Assembly affirmed the importance of freedom of information, declaring that it is “a fundamental human right and . . . is the touchstone of all the freedoms to which the United Nations is consecrated.”<sup>132</sup> The U.N. codified the right to freedom of information in 1948 in the Universal Declaration of Human Rights.<sup>133</sup>

In response to the concerns of some member nations, the U.N. prepared the Draft Convention on Freedom of Information soon after enacting the Universal Declaration.<sup>134</sup> The Draft Convention was presented to the General Assembly in 1949, where it was hotly debated. It was never ratified by the General Assembly, but it laid the foundation for Articles 19 and 20 of the International Covenant on Civil and Political Rights which was adopted by the U.N. and opened for signature in 1966.<sup>135</sup>

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130. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. k (1986)(emphasis added). See *supra* notes 79–80 and accompanying text.

131. Bruno Simma, *Grenzüberschreitender Informationsfluß und domaine réservé der Staaten*, 19 BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT 39, 49–50 (1979). Freedom of information as a principle of international law has been debated since long before World War II, of course. Freedom of speech is protected in the First Amendment to the U.S. Constitution, and a prohibition on the spreading of propaganda has existed at least since the French Revolution. Vernon Van Dyke, *The Responsibility of States for International Propaganda*, 34 AM. J. INT'L L 58, 60 (1940). International law prior to World War II, to the extent that it concerned freedom of information at all, concentrated on regulating or prohibiting propaganda. See Elizabeth Downey, *A Historical Survey of the International Regulation of Propaganda*, 1984 MICH. Y.B. INT'L LEGAL STUDIES (MICH. J. INT'L. L.) 341, 341–45.

132. U.N. GAOR, 1st Sess., pt. 2 at 95, U.N. Doc. A/64/Add. 1 (1947).

133. Article 19 of the Universal Declaration of Human Rights states: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” UNIVERSAL DECL. OF HUMAN RIGHTS, *supra* note 54, art. 19.

134. Draft Convention on Freedom of Information, text at 1947–48 *U.N.Y.B.* 593. See also 1951 *U.N.Y.B.* 508.

135. See Downey, *supra* note 131, at 346–48. See also *International Covenant on Civil and Political Rights*, *supra* note 83, arts. 19 and 20.

Articles 19 and 20 represented a compromise between the nations of the Soviet-aligned East and the U.S.-aligned West. The Soviets favored granting states broad powers to restrict freedom of information to prevent incitement to violence, hatred, or war, while the United States was wary of any restrictions on freedom of speech.<sup>136</sup> Paragraph 3 of Article 19 and Article 20 allowed restrictions on the right of freedom of information for certain purposes, satisfying the Soviets, but kept those exceptions narrow and maintained the primacy of the right, satisfying the United States.<sup>137</sup>

The U.N. prepared the Convention on the International Right of Correction, another document relating to freedom of information, soon after its founding.<sup>138</sup> Countries whose communications systems were still undeveloped or had been severely damaged in the War supported the Convention as a means of counteracting a one-sided supply of news and information.<sup>139</sup> These countries were concerned that the United States could dominate the post-war world through use of its superior communications infrastructure. The Convention came into force in 1952, but it was only ratified by a handful of countries.<sup>140</sup>

The right of correction resurfaced in 1978 with the adoption of a series of documents collectively known as the “New World Information Order” by the United Nations Educational, Scientific and Cultural Organization (UNESCO).<sup>141</sup> This Order included the Declaration of Fundamental Principles Concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to countering Racialism, Apartheid, and Incitement to War. The Declaration of Fundamental Principles does not explicitly refer to the Draft Convention on the International Right of Correction, but it is reminiscent of it. Article 5 provides that countries are entitled to have their own views disseminated if they feel it necessary to correct inequities in the flow of information.<sup>142</sup> It should be noted, however, that the New World Information and Communications Order does not allow states to restrict freedom of information. It seeks

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136. See Downey, *supra* note 131, at 348.

137. See Downey, *supra* note 131, at 348–349.

138. The Convention on the International Right of Correction was proposed in 1948. The U.N. also proposed to address the issue of access to information and its transmission from country to country but was unable to come to agreement over a convention. A draft Convention on the Gathering and International Transmission of News was proposed but never adopted. EDWARD W. PLOMAN, *INTERNATIONAL LAW GOVERNING COMMUNICATIONS AND INFORMATION* 127–28 (1982).

139. See Downey, *supra* note 131, at 350.

140. See Ploman, *supra* note 138, at 128.

141. See Downey, *supra* note 131, at 351.

142. See Downey, *supra* note 131, at 351.

only to promote a balanced flow of information between countries and not to place limitations or restrictions on that flow.<sup>143</sup>

Although these debates about the right to freedom of information have been going on almost constantly since 1949, there can be no doubt that the right extends far enough to protect individuals reporting on or receiving information about torture. As noted above, freedom of information is a fundamental right, subject only to certain limited exceptions such as national security.<sup>144</sup> The burden falls on the state to establish a valid reason for the restriction. The state would probably have to publicly declare its intent to make the restriction in advance,<sup>145</sup> since prior restraint is strongly disfavored by international courts.<sup>146</sup>

Broad restrictions on freedom of information are difficult to justify under the limited exceptions available. Any attempt to restrict the core right to freedom of information regarding torture necessarily implicates the prohibition against torture itself, and is thus even harder to justify. If a state stems the flow of information regarding torture, it is complicit in that torture. The explicit purpose of reporting on torture is to put an end to it, and a government which interferes with this process helps to ensure that torture will continue to be practiced.

The American Convention on Human Rights, The European Convention for the Protection of Human Rights and Fundamental Freedoms, and the African Charter on Human and Peoples' Rights contain similar provisions regarding the rights freedom of information and the grounds on which states may infringe on it.<sup>147</sup> A state trying to justify curbing freedom of information regarding torture must confront the fact that the prohibition on torture is universal<sup>148</sup>

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143. See Michael J. Farley, Comment, *Conflicts Over Government Control of Information—The United States and UNESCO*, 59 TUL. L. REV. 1071, 1074 (1985).

144. See *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) at 41 (1979). See also *Observer and Guardian v. United Kingdom*, 216 Eur. Ct. H.R. (ser. A) at 20 (1991) (restraints necessary in interests of national security, protecting reputation or rights of others, preventing disclosure of information received in confidence and for maintaining authority of judiciary).

145. See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, RECOMMENDATION OF THE COUNCIL CONCERNING GUIDELINES GOVERNING THE PROTECTION OF PRIVACY AND TRANSBORDER FLOWS OF PERSONAL DATA, Sept. 23, 1980, OECD Doc. C(80)58, 20 I.L.M. 422.

146. See LOUKIS G. LOUCAIDES, *ESSAYS ON THE DEVELOPING LAW OF HUMAN RIGHTS* 6 (1995) (citing, inter alia, *Observer and Guardian v. United Kingdom*, 216 Eur. Ct. H.R. (ser. A) at 30 (1991)).

147. See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 221, E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45, Protocol No. 5, E.T.S. 55, and Protocol No. 8, E.T.S. 118; American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 (1970); African Charter on Human and Peoples' Rights (Banjul Charter), June 27, 1981, 21 I.L.M. 59 (1981).

148. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980).

and non-derogable.<sup>149</sup> Even under the African Charter,<sup>150</sup> it would be extremely difficult, if not impossible, for a state to restrict the freedom of information regarding torture without running afoul of the prohibition against torture. Even if restrictions could be permitted under the terms of the regional human rights instruments, the restricting nation would still be in violation of United Nations instruments.

There can be only one conclusion: freedom of information may not be universally accepted, but a core right to freedom of information, encompassing the right to report on or receive information about torture, rises to the level of customary international law. For the purposes of the ATS, a claim will lie where a plaintiff alleges that a defendant interfered with the receipt or transmission of an Internet report on torture, and that such interference violated the plaintiff's right to freedom of information.

### *C. Choice of Law and the Issue of Damages*

The ATS provides a private cause of action and a federal forum for an alien plaintiff seeking redress for a violation of the law of nations.<sup>151</sup> Proving that freedom of information is part of the law of nations is merely a threshold issue. Plaintiffs alleging tortious interference with the freedom of information regarding torture must consider choice of law and damages if they hope to prevail.

There are two classes of possible plaintiffs in actions alleging tortious interference with reporting on torture through the Internet: claimants who are victims of torture, and claimants who report on torture.

A victim of torture should have no difficulty proving damages. A greater problem confronts a plaintiff who was prevented from reporting on torture, but who was not tortured himself. What injury has been suffered? If the plaintiff's communications hardware was damaged or confiscated,<sup>152</sup> the plaintiff could seek compensation for lost property. However, this amount could be trivial if only a single piece of inexpensive but critical hardware, such as a modem, keyboard, or telephone,

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149. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 n. 11 (1986).

150. Arguably the African Charter is the least protective of the freedom of information. *See* African Charter on Human and People's Rights (Banjul Charter), June 27, 1981, 21 I.L.M. 59 (1981), Article 9.

151. *See, e.g.,* Abebe-Jira v. Negewo, 72 F.3d 844, 846–48 (11th Cir. 1996); Xuncax v. Gramajo, 886 F. Supp. 162, 179 (D. Mass. 1995); *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1474–75 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995).

152. Someone seeking to cut the plaintiff's communications could destroy or remove the plaintiff's computer or modem, or important related components.

was involved. Disrupting one's link to the Internet does not necessarily involve damaging any property at all. A computer link can be broken by simply cutting the telephone line or by degrading the signal on an intact line to the point that it is too poor for the modem to communicate.<sup>153</sup> Such an ATS plaintiff will have to claim his injury flows not from physical harm or property damage but from interference with his right to freedom of information.<sup>154</sup> As with the first class of plaintiffs, the question becomes what law should be applied in measuring damages.

The choice of law problem faced by both classes of plaintiffs was addressed by the district court in *Filartiga v. Pena-Irala*.<sup>155</sup> On remand from the Court of Appeals, the court entered judgment for the plaintiff, and turned to the subject of damages. The court said it must look:

... to international law, which, as the Court of Appeals stated, 'became a part of the common law of the United States upon the adoption of the Constitution.' . . . By enacting Section 1350, Congress entrusted that task to the federal courts and gave them the power to choose and develop federal remedies to effectuate the purposes of the international law incorporated into United States common law.<sup>156</sup>

The court weighed the interests of Paraguay, where the tort had occurred, in having its law applied to the case, against the interests of the United States in having international norms applied. The court concluded it should "look first to Paraguayan law in determining the remedy for the violation of international law"<sup>157</sup> but said it would only apply Paraguayan laws to the extent they "do not inhibit the appropriate enforcement of the applicable law or conflict with the public policy of the United States."<sup>158</sup>

The *Filartiga* plaintiffs sought damages for five distinct injuries, including compensation for pain and suffering, loss of income, and medical expenses. These the court awarded in accordance with the *lex*

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153. There are many other ways to disrupt communications. For example, enacting a statute proscribing certain types of communication could conceivably violate the plaintiff's rights.

154. Under American law this is not necessarily a solution, because such a claim would yield only nominal damages. However, it is questionable that American law would apply to the issue of damages. See discussion *infra* pp. 23–25.

155. *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984). For a thorough discussion of choice of law issues in *Filartiga* and related cases, see Richard B. Lillich, *Damages for Gross Violations of International Human Rights Awarded by U.S. Courts*, 15 HUM. RTS. Q. 207 (1993).

156. *Filartiga*, 577 F. Supp. at 863 (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 886 (2d Cir. 1980))(emphasis omitted).

157. *Filartiga*, 577 F.Supp. at 864.

158. *Id.* at 863–64.



*delicti*.<sup>159</sup> The plaintiffs also sought punitive damages, which were not recoverable under the Paraguayan Civil Code. The court nevertheless awarded punitive damages, justifying the award on grounds of public policy by stating that the “manifest objectives” of the international prohibition on torture “can only be vindicated by imposing punitive damages.”<sup>160</sup> The court went on to explain that,

[c]hief among the considerations the court must weigh is the fact that this case concerns not a local tort but a wrong as to which the world has seen fit to speak. Punitive damages are designed not merely to teach a defendant not to repeat his conduct but to deter others from following his example . . . To accomplish that purpose this court must clear the depth of the international revulsion against torture and measure the award in accordance with the enormity of the offense. Thereby the judgment may perhaps have some deterrent effect.<sup>161</sup>

The court concluded that “punitive damages of no less than \$5,000,000 to each plaintiff is appropriate . . . .”<sup>162</sup>

*Filartiga* points to a solution for the choice of law problem confronted by both classes of plaintiffs. Damages may be awarded to the first class of plaintiff in accordance with the *lex delicti*, but only insofar as they adequately reflect the world’s distaste for torture. Where they are inadequate, the court may award a larger sum, including punitive damages. The “manifest objectives behind the international prohibition on torture”<sup>163</sup> demand nothing less. The second class of plaintiffs may seek compensation for property damage, if any has occurred, but in addition, the plaintiff may seek punitive damages. *Filartiga* noted a general hesitancy by American courts to award punitive damages, but pointed out there was some “precedent for the award of punitive damages in [international] tort” on rare occasions.<sup>164</sup> The court made reference to *Letelier*, where the DC district court awarded punitive damages of \$2,000,000 for “tortious actions . . . in

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159. *See id.* at 865.

160. *Id.* at 864, 865. The *Filartiga* court based its decision partly on *dicta* from *The Marianna Flora*, 24 U.S. 1, 41, 6 L. Ed. 405 (1826), where Justice Story wrote that “an attack from revenge and malignity, from gross abuse of power, and a settled purpose of mischief . . . may be punished by all the penalties which the law of nations can properly administer.” *Filartiga*, 577 F. Supp. at 865 (*quoting* *The Mariana Flora*, 24 U.S. 1, 41, 6 L. Ed. 405 (1826)).

161. *Filartiga*, 577 F.Supp. at 866.

162. *Id.* at 867.

163. *Id.* at 865.

164. *Id.* at 865.

violation of international law.”<sup>165</sup> A violation of one’s freedom of information regarding torture strongly implies complicity with the act of torture itself. Given the international condemnation of torture, punitive damages would be justified where there is no other plausible explanation for the defendant’s conduct.

#### IV. FASHIONING A CAUSE OF ACTION FOR VIOLATIONS OF THE PROHIBITION AGAINST TORTURE

Apart from a claim for violation of the freedom of information, interference with reporting on or receiving information about torture over the Internet should give rise to an ATS claim for violation of the prohibition against torture. In contrast to the freedom of information, whose status as customary international law is arguable, there is no doubt that the prohibition on torture rises to the level of custom.<sup>166</sup> For this claim to be tenable, however, a plaintiff must establish that the party interfering with Internet communications on torture becomes implicated in the act of torture itself.

A claim for torture may be brought under the Torture Victim Protection Act, which was passed by Congress partly in response to *Filartiga* and its progeny.<sup>167</sup> The TVPA states:

An individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extra-judicial killing, shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.<sup>168</sup>

Determining who may be held liable for torture requires an understanding of the phrase “subjects an individual to torture” which in turn

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165. *Id.* at 865 (citing *Letelier v. Republic of Chile*, 502 F.Supp. 259, 266 (D.D.C. 1980)).

166. *See supra* note 131 and accompanying text.

167. *See supra* pp. 15–16 and accompanying notes. The TVPA codified the holding of *Filartiga*, establishing “an unambiguous basis for a cause of action” under the ATS, but expanded the remedy “also to U.S. citizens who may have been tortured abroad.” The TVPA does not preempt the ATS, under which claims based on violations of customary international law other than torture may still be brought. S. REP. NO. 102–249, at 4 (1991).

168. Torture Victim Protection Act § 2, 28 U.S.C. § 1350 (1994).

requires an examination of the legislative history of the TVPA, and the United Nations Convention Against Torture.<sup>169</sup>

It is no coincidence that the language of the TVPA is similar to the Convention Against Torture. Congress passed the TVPA to carry out the letter and the intent of the Convention, and the TVPA explicitly adopts the definition of torture from the Convention.<sup>170</sup> In its report on the Act, the House Judiciary Committee notes that the Convention was strongly supported by the U.S., and that it “obligates state parties to adopt measures to ensure that torturers are held legally accountable for their acts.”<sup>171</sup> “One such obligation is to provide means of civil redress to victims of torture.”<sup>172</sup> The TVPA, says the report, is Congress’ response to this obligation.<sup>173</sup>

The Report of the Senate Judiciary Committee echoes the House Report. The purpose of the TVPA is to “carry out the intent of the Convention,” under which states are obligated “to adopt measures” ensuring torturers are held accountable.<sup>174</sup> “This legislation will do precisely that,” says the Senate Report.<sup>175</sup>

Both the legislative history of the TVPA and the Convention on Torture indicate that a person does not have to conduct torture personally to be held liable for such an act. The Senate Report explains that the TVPA allows a torture victim to sue “persons who ordered, abetted, or assisted in the torture,” including higher officials, even though those officials may not have personally performed or ordered the abuses.<sup>176</sup> “Under international law,” says the Report, “responsibility for torture . . . extends beyond the person or persons who actually committed those acts—anyone with higher authority who authorized, tolerated, or knowingly ignored those acts is liable for them.”<sup>177</sup> The Senate Report approvingly quotes the Inter-American Convention to Prevent and Punish Torture, which holds any person who “orders, instigates or induces the use of torture, or directly commits it or who, being able to prevent it, fails to do so” liable for the crime of torture.<sup>178</sup> The Senate Report also

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169. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Oct. 21, 1994, S. Treaty Doc. No. 100–20 (1988), G.A. Res. 39/46, U.N. GAOR, 39th Sess., 93d plen. Mtg., Supp No. 21 at 197, U.N. Doc. A/39/51 (1984) [hereinafter *Convention against Torture*].

170. S. REP. NO. 102–249, at 3 (1991); H.R. REP. NO. 102–367, at 3 (1991).

171. H.R. REP. NO. 102–367, at 3 (1991).

172. *Id.*

173. *See id.*

174. S. REP. NO. 102–249, at 3 (1991).

175. *Id.*

176. *Id.* at 8–9.

177. *Id.* at 9.

178. *Id.* at n. 16.

cites *Forti v. Suarez-Mason*<sup>179</sup> and *In re Yamashita*,<sup>180</sup> two cases where higher officials were held responsible for torture and summary execution even though they were not themselves accused of committing those acts. The Report points out that “low-level officials cannot escape liability by claiming that they were acting under orders of superiors.”<sup>181</sup>

The House Report says less about TVPA liability than the Senate Report, but nevertheless indicates that persons may be liable even if they did not personally perform the acts of torture in question. Unlike the Senate Report, the House Report does not explicitly state that higher authorities who order, tolerate, or knowingly ignore torture may also be held liable. Nevertheless, it approvingly cites *Filartiga* and declares that the TVPA expands the existing remedy available under the ATS, implying that such persons may be liable.<sup>182</sup> The House Report also does not cite *Forti*, but it seems unlikely the Report would have spoken so favorably of *Filartiga* and expanded the ATS remedy if felt strongly that *Forti* was wrongly decided.<sup>183</sup>

Like the Senate Report, the House Report ties the TVPA to international definitions of torture, indicating that the House believed that TVPA liability should reach more than just those persons who personally commit torture. The Report states that the TVPA provides a cause of action against anyone who “subjects a person to torture . . .” and defines torture “in accordance with international standards.”<sup>184</sup> The definition of torture in the TVPA “tracks the definition of ‘torture’ adopted in the Torture Convention and the understandings included in the Senate’s ratification of the Convention.”<sup>185</sup>

The Convention on Torture places responsibility for acts of torture not only on the person committing the torture, but also on anyone who assisted or abetted the torture. Article 1 defines torture expansively and expressly implicates persons who abet or tolerate torture:

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179. *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987). The Report states that “although Suarez Mason was not accused directly of torturing or murdering anyone, he was found civilly liable for those acts which were committed by officers under his command about which he was aware and which he did nothing to prevent.” S. REP. NO. 102-249, at 9 (1991).

180. *In re Yamashita*, 327 U.S. 1 (1946). The Report states that “the Supreme Court held a general of the Imperial Japanese Army responsible for a pervasive pattern of war crimes committed by his officers when he knew or should have known that they were going on but failed to prevent or punish them.” S. REP. NO. 102-249, at 9 (1991).

181. S. REP. NO. 102-249, at 9 (1991).

182. See H.R. REP. NO. 102-367, at 3-4 (1991).

183. The House report does not cite *In re Yamashita* either, but that is understandable. *In re Yamashita* was decided in 1946 and did not involve the ATS.

184. H.R. REP. NO. 102-367, at 4 (1991).

185. *Id.*

Article 1. (1) For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain and suffering is *inflicted by or at the instigation of or with the consent or acquiescence of a public official* or other person acting in an official capacity. . . .<sup>186</sup>

Although Article 1 refers to a “definition” of torture, it instead gives a *description* of torture for the purpose of understanding and implementing the Convention.<sup>187</sup>

If Article 1 were a definition, a defendant could argue that the phrase “consent or acquiescence of a public official” is only relevant to determining what acts constitute torture, and that it does not define who a torturer is for purposes of determining liability. “Torturer”, under such an interpretation, is not defined. A court hearing a torture claim would have no clear idea what it means to “subject a person to torture” for the purposes of the TVPA. Reading Article 1 as a *description* of torture avoids this problem, because it implicitly defines several relevant terms and provides the court with guidance as to how to interpret the language of the TVPA.

The language of Articles 2 and 4 also demonstrates that responsibility for torture should be assigned broadly. Article 2 requires each signatory state to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”<sup>188</sup> This does more than simply require that a state make torture illegal. A party state must take affirmative steps to *prevent* acts of torture.<sup>189</sup> Article 4 mandates that each state must criminalize torture, and also requires that criminal sanctions be applied “to an attempt to commit torture and *to an act by any person which constitutes complicity or participation in torture.*”<sup>190</sup>

Together, Articles 2 and 4 place the burden on the state to intervene when it discovers that torture is being conducted and to work actively to

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186. Convention against Torture, *supra* note 169, at 197 (*emphasis added*).

187. J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE. A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 122 (1988).

188. Convention Against Torture, *supra* note 169, § 2(1) at 197.

189. *Id.*

190. Convention against Torture, *supra* note 169, § 4(1) at 198 (*emphasis added*).

stop torture from occurring in the future. In light of the broad description of torture contained in Article 1, instigation of torture, consent, or acquiescence should be considered complicity for purposes of Article 4. Any official who is complicit regarding torture becomes implicated in the torture itself. Therefore, under the Convention, liability will attach to any official who does nothing more than look the other way in the face of torture. Any greater level of involvement by an official, even providing the slightest amount of affirmative assistance to torturers, also makes that official liable.

The TVPA thus allows suits against any persons implicated in the torture, not just the persons committing the prohibited acts. While the Senate and House reports are quite clear on this issue, the dispositive fact is that the TVPA explicitly carries out the intent of the Convention and adopts the Convention's definition of torture.

For the purposes of the ATS, this establishes that interference with Internet reports on torture is a tortious violation of the customary international law against torture. If one of the purposes of reporting on torture is to help prevent it, and interfering with reporting makes that job more difficult, such interference must constitute complicity in the torture. If a state must take affirmative action to prevent torture, and offering even minimal assistance to torturers implicates officials in the torture, an official who takes any steps to hinder Internet reports on torture is liable under the TVPA for abetting and assisting in torture.<sup>191</sup>

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191. But—for causation, i.e. that but-for suppression of an Internet report the torture being reported on would not have occurred, is not required to establish liability. States have an affirmative obligation to stop any torture occurring within their borders, *see supra* notes 171–175 and accompanying text, and governments can be implicated in torture merely by their acquiescence to the act, *see supra* note 177 and accompanying text. Since this low threshold of liability can be met by mere inaction, actively assisting torture by interfering with Internet reports will also meet this threshold. *See also* Forti v. Suarez-Mason, 672 F.Supp 1531 (N.D. Cal. 1987)(holding the defendant civilly liable for those acts which were committed by officers under his command about which he was aware and which he did nothing to prevent, even though he was not accused of torturing or murdering anyone directly).

For the same reasons, a defendant government will also be liable in tort for complicity after-the-fact. Where the suppressed Internet report relates to ongoing torture, there is no question that the state is liable. As long as the torture continues, and the state prevents reporting, it is implicated.

A problem may arise if the victim is no longer being subjected to torture when the Internet report is suppressed. A defendant may claim that after-the-fact suppression is not causally linked to the torture and that although the state violated international law, it did not commit a tort. This defense should be rejected however, as such a causal link is not required, as noted above. For the purposes of the Convention Against Torture, liability attaches when a person is merely complicit in torture. There are no distinctions between the persons actually conducting the torture and persons ordering, consenting to, or acquiescing in the torture, *see supra* notes 178–179 and accompanying text, and the Convention does not require that consent or acquiescence be expressed before the torture actually occurs.

## V. ADDITIONAL BARRIERS TO ATS CLAIMS

While interference with Internet reports on torture constitutes tortious violations of both the right to freedom of information on torture and the prohibition on torture, plaintiffs will have to clear still more hurdles before their claims will prevail.

### A. *Sovereign Immunity*

The doctrine of sovereign immunity presents a substantial barrier to ATS litigation. Plaintiffs trying to sue torturers and their accomplices may have trouble finding them; the persons' names may not be known to the plaintiffs. If their identity is known, they may be beyond the jurisdiction of U.S. courts or otherwise judgment-proof. They may be dead. If they are alive and can be subjected to trial, they may have almost no assets against which to execute civil judgment.<sup>192</sup>

For all these reasons it is desirable to sue the state in which the torture occurred, either the government itself or the head of state. The government is easily identifiable, and it may have property or accounts in the U.S., providing a deep-pocket defendant. Unfortunately, sovereign immunity will insulate governments from liability in almost all cases.

*Filartiga* and the TVPA conclusively establish that an action against individual defendants is available under the ATS. Whether states can be defendants, however, has been an open question until recently. In *Argentine Republic v. Amerada Hess Shipping Corp.*,<sup>193</sup> the Supreme Court rejected an ATS claim against Argentina made by a plaintiff whose ship had been damaged in the Falklands War, allegedly in violation of international law. The Court disallowed the ATS claim, holding that the Foreign Sovereign Immunities Act<sup>194</sup> (FSIA) is “the sole basis for obtaining jurisdiction over a foreign state in our courts.”<sup>195</sup> The FSIA lists several exceptions to the rule of sovereign immunity, including exceptions for commercial activities, but it contains no exceptions for violations of international law of the type alleged by the *Amerada Hess*

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In addition, after-the-fact suppression of reporting could be viewed as strong inferential evidence that the defendant state acquiesced in the torture at the time the torture was occurring. It also implies that a state is benefiting from the torture. Based on such evidence, a finder of fact could conclude the defendant was complicit.

Even if an after-the-fact defense is available, the defendant state would still be liable for tortious interference with the freedom of information.

192. See, e.g., *Filartiga v. Pena-Irala*, 577 F.Supp. 860 (E.D.N.Y. 1984).

193. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

194. 28 U.S.C. §§ 1330, 1441(d), 1602–11 (1994).

195. *Amerada Hess*, 488 U.S. at 434.

plaintiff.<sup>196</sup> The FSIA also contains no exceptions for human rights violations. By ruling in *Amerada Hess* that the FSIA does not include exceptions for violations of international law, it appeared the Supreme Court foreclosed the possibility that there may be a human rights exception to sovereign immunity.

After *Amerada Hess*, one law student Comment argued that violations of *jus cogens* should be considered an implied waiver to sovereign immunity.<sup>197</sup> This approach was rejected, however, in *Siderman de Blake v. Republic of Argentina*,<sup>198</sup> in which the plaintiffs sued for torture under the ATS. The Ninth Circuit acknowledged the cleverness of the student's argument, but held that *Amerada Hess* tolerated no derogation. Jurisdiction is only available under the FSIA. The Act does not list violations of *jus cogens* as an exception to sovereign immunity, so immunity may not be denied on that ground.<sup>199</sup>

*Siderman* has recently been reinforced by *Princz v. Federal Republic of Germany*,<sup>200</sup> in which an American survivor of the Holocaust sought damages from Germany.<sup>201</sup> A divided District of Columbia Circuit Court of Appeals granted sovereign immunity to the German government, which deprived the court of jurisdiction, and the case was dismissed. According to one commentator,

[f]or those wishing to sue foreign sovereigns in American courts for human rights violations suffered abroad, *Princz* destroyed whatever hopes were left after *Amerada Hess* and *Siderman* . . . . On the one hand, the decision affirmed the principle that the FSIA is the exclusive jurisdictional basis in such suits . . . . On the other hand, the case demonstrated that it is nearly impossible for plaintiffs successfully to invoke any of the FSIA's exceptions.<sup>202</sup>

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196. See 28 U.S.C. § 1605 (1994).

197. See Adam C. Belsky et al., Comment, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365 (1989).

198. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992).

199. See *id.* at 718–19.

200. *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), *cert. denied*, 115 S.Ct. 923 (1995).

201. Princz was an American citizen living in Czechoslovakia in 1942 when he was arrested and sent to Auschwitz. He was liberated in 1945, but because he was an American, he was sent to an American army hospital and not to the Center for Displaced Persons like other prisoners, and so was denied compensation paid to Holocaust survivors processed at the Center. For an informative discussion of *Princz* and the doctrine of sovereign immunity, see Mathias Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on Princz v. Federal Republic of Germany*, 16 MICH. J. INT'L L. 403 (1995).

202. *Id.* at 415.



It appears that claims against foreign sovereigns will be possible only if Congress amends the FSIA to include a human rights exception.<sup>203</sup>

Although governments may be protected by sovereign immunity, there remains the possibility that parastatal telecommunications companies or their staff may be liable for tortious violations of the freedom of information or the prohibition against torture.<sup>204</sup> Telecommunications companies could be implicated in these torts if they play any role in cutting the reporting party's computer link to the Internet. They would be guilty of complicity, for example, if some of their personnel accompany police in raiding the reporter's home or office, and confiscate telephones or other important hardware.

As long as there is no specific FSIA exception for human rights violations, however, a claim against a state-owned telecommunications company will still need to come within one of the existing FSIA exceptions. The commercial activity exception is probably the best option for a plaintiff, but even this provision is unlikely to provide jurisdiction. The exception provides jurisdiction where "the action is based upon . . . an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."<sup>205</sup>

A telecommunications company is engaged in commercial activity elsewhere and transacts with all other countries of the world through its international telephone lines. It must cooperate with the United States to gain access for its customers to the U.S. telephone network, and to allow U.S. customers to reach parties over its own network. A party reporting on torture may use a computer network to exchange information with interested groups in the U.S. Thus, any disruption of these communications by the parastatal telecom company would have a clear effect on the U.S.: interested Americans could no longer receive information from or communicate with the reporting party. The issue is whether such a disruption rises to the level of "direct effect" in terms of the Immunity of Foreign States Act.

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203. *See id.* at 415–18.

204. Who can be sued depends on whether the claimant relies on the ATS alone, or the ATS and the TVPA. An ATS claim could be made against the company for tortious interference with the freedom of information. Under the TVPA, however, the claim could only be made against individual company personnel. The TVPA only holds individuals liable for torture. 28 U.S.C. § 1350 (1998). According to the Senate Report, "[t]he legislation uses the term 'individual' to make crystal clear that foreign states or their entities cannot be sued. Consequently, the TVPA is not meant to override the Foreign Sovereign Immunities Act . . . which renders foreign governments immune from suits in U.S. courts, except in certain circumstances." S. REP. No. 102–249, at 7 (1991).

205. 28 U.S.C. § 1605(a)(2) (1994).

As the law stands today, this is an open question. The FSIA gives no guidance as to the meaning of “direct effect.”<sup>206</sup> The Supreme Court in *Republic of Argentina v. Weltover*<sup>207</sup> stated that “direct” does not need to be “substantial” or “foreseeable”, but needed to be more than “purely trivial” and must follow “as an immediate consequence of the defendant’s activity.”<sup>208</sup> The Supreme Court looked to the “minimal contacts” test of *International Shoe Co. v. Washington*<sup>209</sup> as “an aid in interpreting the direct effect requirement . . . .”<sup>210</sup> A thorough analysis of the minimal contacts test could fill several books; such a detailed discussion is not appropriate here. Because precedent does not provide more guidance, it suffices to note that the minimal contacts test is a fairly easy test to satisfy. If courts interpret direct effect as the analog of minimal contacts, the immunity exception may apply.

To make a direct effect argument, the plaintiff alleging either interference with the right to freedom of information or violation of the prohibition on torture may argue that the direct effect is the severing of communications between the receiving party in the U.S. and the reporting party abroad. This effect occurs as a direct result of the defendant’s disruption of Internet communication. Moreover, because there is a causal connection between cutting communications and either of the claims, the effect on the U.S. is an integral element of the tort claim. Both claims are based on the defendant inhibiting cyberspace communications. In other words, if the line to the U.S. were not cut, Internet communication would have continued, and a tort would not have occurred. Both claims can arise only if the parastatal utility acts in a way that directly effects the communications with the U.S.

Still, a plaintiff will almost certainly encounter substantial difficulty in making such a claim. Previously, when confronted by more conventional tort claims arising overseas, courts have been reluctant to apply the commercial exception.<sup>211</sup> Claims arising out of Internet communications are certainly different from garden-variety torts, but the simple fact that such claims are unusual will not be sufficient to bring them

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206. *Id.*

207. *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992).

208. *Id.* at 617–618.

209. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

210. *Weltover*, 504 U.S. at 619, 619 n.2.

211. *See, e.g., Anatares Aircraft v. Federal Republic of Nigeria*, 999 F.2d 33 (2d Cir. 1993)(tort claim arising from the detention of an aircraft overseas dismissed for failure to show “direct effect” on the U.S.); *Martin v. Republic of South Africa*, 836 F.2d 91 (2d Cir. 1987)(financial loss resulting from personal injury suffered abroad is not a “direct effect” on the U.S.); *Zernicek v. Brown & Root, Inc.*, 826 F.2d 415, 419 (5th Cir. 1987)(consequential damages from personal injury abroad are insufficient to constitute a “direct effect” on the U.S.). *See also Prinz v. Federal Republic of Germany*, 26 F.3d 1166.

within the exception.<sup>212</sup> Courts may be reluctant to apply the exception to a fact situation which, undeniably, Congress did not consider when it enacted the FSIA.<sup>213</sup>

### B. *The Act of State Doctrine and the Political Question Doctrine*

Plaintiffs will also have to confront the act of state doctrine and the political question doctrine. In *Underhill v. Hernandez*,<sup>214</sup> the Supreme Court explained that the act of state doctrine holds that U.S. courts may not “sit in judgment on the acts of the government of another [country] done within its own territory.”<sup>215</sup> Subsequently, in *Banco Nacional de Cuba v. Sabbatino*, the Supreme Court decided that the doctrine dictates that U.S. courts may not reach the merits of certain claims, even where the conduct complained of violates international law.<sup>216</sup> This raises the

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212. As of this writing, no court in the United States has been confronted with an ATS claim arising from cyberspace contacts with the United States.

213. A third class of defendants may soon be available to human rights claimants. In *Kadic v. Karadzic*, 70 F.3d. 232 (2d Cir. 1995), the plaintiff sued a leader of a Bosnian-Serb faction in the former Yugoslavia, alleging he and his troops were responsible for systematic human rights violations. The Second Circuit refused to dismiss the suit, holding that private actors can be liable for violations of the law of nations, even if they are not acting on behalf of a recognized government. Building on *Kadic*, some courts have indicated a willingness to entertain claims against multinational corporations. In one pending suit, villagers from Myanmar allege Unocal Corp. and Total S.A. colluded with the Myanmar military government to relocate and enslave them as part of a pipeline construction project on the Thai border. *John Doe v. Unocal Corp.*, 963 F.Supp. 880 (C.D. Cal. 1997).

In all claims against multinationals, courts are consistently requiring a showing of state action. *Kadic* held that some human rights violations, including torture, “are proscribed by international law only when committed by state officials or under color of law.” *Kadic* 70 F.3d at 243 (citing Convention Against Torture Art. 1). Citing *Kadic*, one court dismissed murder and torture claims against a corporation operating in Indonesia, holding that private actors can only be liable for such crimes if they act under color of law. *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362 (E.D. La. 1997). The court relied on the jurisprudence of 42 U.S.C. § 1983 and the test in the Restatement § 207 to determine whether state action was present. *See Beanal*, 969 F. Supp. at 374.

Nevertheless, human rights advocates are undaunted and promise to bring more suits against corporations in the future. Jennifer M. Green, a staff attorney with the Center for Constitutional Rights who is involved with the *Unocal* case, argues that it is now “established firmly” in the Second Circuit that private actors such as corporations can be held liable for human rights violations just like states. She hopes that the threat of lawsuits might force companies to work to curb human rights abuses. Dominic Bencivenga, *Suits Attempt to Extend Liability to Corporations*, 218 N.Y.L.J. 46, Sept. 4, 1997, at 6. “If sheer morality doesn’t do it, maybe hitting the pocketbook of companies will make a difference,” says Green. *Id.* at 5.

The ultimate effect of these cases on human rights advocacy remains to be seen. As the law develops, parastatals and multinationals may become increasingly vulnerable to ATS claims, providing plaintiffs with a new range of litigation options.

214. *Underhill v. Hernandez*, 168 U.S. 250 (1897).

215. *Id.* at 252.

216. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

possibility that claims based on international human rights law could be dismissed under the act of state doctrine.<sup>217</sup>

To date, ATS plaintiffs have not been barred from recovery by the act of state doctrine. In *Filartiga v. Pena-Irala*, Judge Kaufman expressed doubt in *dicta* whether acts in violation of the Constitution and the laws of the Republic of Paraguay can be properly characterized as acts of state.<sup>218</sup> Subsequent case law has followed *Filartiga*, and found the act of state doctrine inapplicable to violations of the law of nations.

The legislative history of the TVPA indicates that this doctrine should not bar TVPA claims. In reporting on the Act, the Senate Judiciary Committee expressed its belief that “because no state officially condones torture or extrajudicial killings, few such acts, if any, would fall under the rubric of ‘official actions . . . .’”<sup>219</sup> According to this analysis, the act of state doctrine should not bar an ATS claim for tortious interference with the freedom of information regarding torture, since states presumably do not condone that either. However, the question remains ambiguous. Until Congress speaks definitively on the issue it remains possible that claims raised under the ATS, and perhaps the TVPA, may be dismissed on these grounds.<sup>220</sup>

The political question doctrine is another open question for plaintiffs. The doctrine prevents the judicial branch from deciding issues textually committed to the legislative or executive branches.<sup>221</sup> In *Baker v. Carr*,<sup>222</sup> the Supreme Court pointed out that “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”<sup>223</sup> One view holds that the political question doctrine can bar ATS claims,<sup>224</sup> but this remains a minority position. In fact, a handful of recent cases have rejected attempts to dismiss tort actions on grounds of the doctrine.<sup>225</sup> Nevertheless, as with the act of state doctrine, it would be comforting if Congress would settle this question.

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217. For a thorough discussion of this issue, see Reimann, *supra* note 201, at 427–31.

218. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 889 (2d Cir. 1980).

219. S. REP. NO. 102–249, at 8 (1991).

220. See also Reimann, *supra* note 201, at 430 (urging legislative clarification of the applicability of the act of state doctrine to human rights claims).

221. See *Baker v. Carr*, 369 U.S. 186 (1962) (concerning equal protection challenge to a legislative reapportionment).

222. *Id.*

223. *Id.* at 211.

224. See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 823 (D.C. Cir. 1984) (Robb, J., concurring) (dismissing ATS claim on grounds of the political question doctrine).

225. See, e.g., *Linder v. Portocarrero*, 963 F.2d 332 at 336–337, (11th Cir. 1992); *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 257–259 (D.D.C. 1985); *Abebe-Jira v. Negewo*, 72 F.3d. 844, 847–848 (11th Cir. 1996).

## CONCLUSION: THE NEED FOR LEGISLATIVE REFORM

While interference with Internet reports on torture clearly violates the law of nations for purposes of the Alien Tort Statute, plaintiffs will nevertheless face an uphill battle in making their claims. U.S. and international law establish the basis for plaintiffs' claims of aiding and abetting torture, but Congress should amend the Torture Victim Protection Act to establish an unambiguous cause of action for interference with the right to freedom of information regarding torture. No change needs to be made in the choice of law rules if U.S. courts follow the *Filartiga* approach, because they can apply the *lex delicti* except where necessary to properly reflect the international censure against torture. Such an approach is entirely consistent with the law of nations and the law of the United States. Even if the causes of action are clearly established, plaintiffs will still face the act of state doctrine and the political question doctrine. Congress should explicitly take these into account in any of its enactments.

The greatest hurdles for plaintiffs, however, are the limited exceptions to sovereign immunity provided under the Foreign Sovereign Immunities Act.<sup>226</sup> Congress must extend these exceptions to cover violations of the prohibition on torture. Such an extension was proposed as part of counterterrorism legislation introduced in response to the Oklahoma City bombing of 1995. The House version of the Bill denied sovereign immunity where "money damages are sought against a foreign state" for torture and other acts, "or the provision of material support" for such acts, where the act or provision of support "is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office . . . ."<sup>227</sup> The immunity exception was to be available in suits by any "national of the United States,"<sup>228</sup> and thus immunity would still be available in ATS suits by alien plaintiffs.<sup>229</sup>

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226. See 28 U.S.C. § 1605(a) (1994).

227. Comprehensive Antiterrorism Act of 1995, H.R. 2703, 104th Cong. § 803 (1995)(proposing to amend 28 U.S.C. § 1605).

228. *Id.*

229. In discussing the jurisdictional provision in one version of the bill, the House Judiciary Committee stated that "[i]t is expected that a lawsuit proceeding under this section will be brought either by the victim, or on behalf of the victim's estate in the case of death or mental incapacity." H.R. REP. NO. 104-383 at 105 (1996). The House Bill explicitly adopted the Immigration and Nationality Act's definition of "national of the United States," Comprehensive Antiterrorism Act of 1995, H.R. 2703, 104th Cong. § 803 (1995)(proposing to amend 28 U.S.C. § 1605), which includes anyone who is "a citizen of the United States" or who "owes permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22) (1994). This definitional language was retained in the legislation as it was eventually enacted, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241 (codified as amended at 28 U.S.C.A. §§ 1605, 1610(a) (West Supp. 1998)), leaving

The House Bill also offered the prospect of suing a “deep-pocket” defendant.<sup>230</sup> The original Senate Bill did not contain this language and denied sovereign immunity only to nations designated as state sponsors of terrorism.<sup>231</sup>

The Conference Report retained these provisions from both the House and Senate Bills<sup>232</sup>, and the law as enacted thus contained the Senate’s limited exception of immunity for only state sponsors of terrorism.<sup>233</sup> This means that from the time the bill was enacted, claims can be filed against only five countries: Iran, Cuba, Iraq, Syria, and North Korea.<sup>234</sup> All other states continue to enjoy full immunity. Further amendments are needed if deserving plaintiffs are to prevail in court. Congress has taken a step in the right direction by depriving some states of immunity where they commit or are complicit in torture, but all countries should be denied immunity.

The growth of computer technology and the resulting upsurge in international Internet communications present new challenges to human rights advocates as the Twentieth Century draws to a close, but it also presents new opportunities. With the passage of the TVPA in 1992 Congress committed itself to redressing the injuries of persons subjected to torture, and added another weapon to the arsenal deployed against perpetrators of torture. Congress should act now to ensure that U.S. courts remain able to respond to acts that violate customary international law, despite the new and unexpected ways in which these acts may be carried out.

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open the possibility that claims could be filed by naturalized U.S. citizens on behalf of foreign relatives.

230. Under the current law, defendants are frequently judgment proof, *see infra* p. 29, but the House Bill permitted recovery against the assets of a foreign state. Comprehensive Antiterrorism Act of 1995, H.R. 2703, 104th Cong. § 803 (1995)(proposing to amend 28 U.S.C. § 1610(a) to deny a foreign state immunity from attachment where sovereign immunity is denied under the exceptions contained in 28 U.S.C. § 1605(a)(7)).

231. Comprehensive Terrorism Prevention Act of 1995, S. 735, 104th Cong § 205 (1995)(proposing to amend 28 U.S.C. § 1605)(citations omitted).

232. H.R. Rep. No. 104–518, at 29–30 (1996).

233. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, § 221, 110 Stat. 1214, 1241 (codified as amended at 28 U.S.C.A. §§ 1605, 1610(a) (West Supp. 1998)).

234. *See* Bureau of Export Administration, Special Country Policies and Provisions, 15 C.F.R. § 785 (1995).

Human rights in cyberspace is a relatively new and uncharted area of law. The United Nations Human Rights Council (UNHRC) has stated that the freedoms of expression and information under Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) include the freedom to receive and communicate information, ideas and opinions through the Internet. An important clause is Article 19(3) of the ICCPR, which provides that

2 Michael N. Schmitt, *Cyberspace and International Law: The Penumbra of Uncertainty*, *Harvard Law Review Forum*, 5 April 2013 (Nov. 10, 2018), available at <http://harvardlawreview.org/2013/04/cyberspace-and-international-law-the-penumbra-of-uncertainty/>. This extends in the third part into the issue of state sovereignty in the context of internet regulation. The fourth part studies the measures that may be employed by states to counter cyber attacks and unauthorised entry to servers. In the final part, the question of attribution of responsibility for cyber operations is analysed.

1. International Law and Cyberspace. The application of customary international law to cyberspace is not a new question and it has garnered a lot of attention. The United Nations Human Rights Committee (HRC) has provided extensive commentary on this article in its General Comment number 34: Freedoms of opinion and expression. 4 The HRC has stated that the freedoms of expression and information under article 19 of the ICCPR include the freedom to receive and communicate information, ideas and opinions through the Internet. 5. Article 19(3) provides that

Human rights in cyberspace, September 2013. A number of these laws are based on valid grounds for restriction referred to in article 19(3) of the ICCPR. Human rights™ for the purposes of the Commission™s work include the rights and freedoms recognised in the ICCPR, including the right to freedom of expression and information in article 19.